STATE OF MICHIGAN

COURT OF APPEALS

RODNEY SMITH,

Plaintiff-Appellant,

v

SHERRY MYERS and STANDISH COMMUNITY HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
December 14, 2010

No. 293728
Arenac Circuit Court
LC No. 09-010816-CZ

Before: MURPHY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants.[1] We affirm.

On March 26, 2009, plaintiff, acting in propria persona, filed a document entitled "statement of un[d]isputed facts and petition for declaratory judgment." In this document, he indicated that both he and defendant Sherry Myers had been employees of Standish Community Hospital; he worked "part-time/contingent" and Myers was his supervisor. He alleged that a full-time position became available in November 2005 and he was not hired for it. According to plaintiff, Myers indicated that plaintiff was not offered the position because he had been late with reports to other departments, had been late responding to other departments, and had had an unspecified communication problem. Plaintiff argued that Myers wrongly denied him access to time records and failed to adequately indicate what the alleged communications problems were. Plaintiff further alleged that after he made a "company corporate compliance complaint," Myers began filing false reports, evaluations, and disciplinary actions concerning him, in retaliation.

Plaintiff stated that he was denied two more positions, in June 2006 and December 2006, and that he "was denied by the hospital because of the false information given by Myers." Plaintiff stated:

[1] It appears that plaintiff intended for Standish Community Hospital to be dismissed from the case, but this dismissal apparently did not occur before the grant of summary disposition.

> Petitioner Smith believes that at least part of the motivation behind Myers' malicious and intentional behavior to be the fact that the person who did fill the full time position in November of 2005 was a former female co-worker and friend of Myers. Further, the person who did fill the full time position in June of 2006 was a daughter of someone from another department of the hospital. Smith believes that keeping him out of the third opening in Dec. 2006, was motivated solely by Myers' retaliation and spite because of Smith exposing these truths about Myers. Smith believes Myers then used any method of dirty pool including lying and intentionally filing false information to the hospital to keep him out of these positions.

Plaintiff stated that he sent Myers a letter "giving her yet another opportunity to be truthful and to determine what facts that Smith should rely on." Plaintiff stated that Myers did not respond and that "Myers' conduct in regards to said notice directly caused Smith to believe that all facts within said notice and thus all facts herein are indeed true and were agreed with, accepted, and undisputed by Myers."

Plaintiff requested a declaratory judgment that Myers, through her silence, accepted the version of the facts as set forth by plaintiff. Plaintiff also alleged that Myers committed fraud and also violated MCL 750.370, a criminal statute that states:

> Any person who shall falsely and maliciously, by word, writing, sign, or otherwise accuse, attribute, or impute to another the commission of any crime, felony or misdemeanor, or any infamous or degrading act, or impute or attribute to any female a want of chastity, shall be guilty of a misdemeanor.

Finally, plaintiff alleged that Myers committed tortious interference with a business relationship through her "false information to the hospital that interfered with and caused the hospital to deny Petitioner a full time contract (not once, but 3 times) . . . ."

Myers filed an answer stating, among other things, that she was not properly served with the "complaint." She indicated that the document entitled "Proof of Service" that was filed with the summons "simply contains a series of paragraphs indicating that certain documents created by the Plaintiff were claimed to have been served upon the Plaintiff [sic]." Myers further stated that the hospital's decisions were proper exercises of business judgment. On May 13, 2009, she filed for summary disposition under MCR 2.116(C)(8) and to strike pleadings under MCR 2.115(B). Myers contended that the documents she received entitled "Summons" and "Proof of Service" were not drafted in accordance with MCR 2.113. She stated that "Plaintiff's document submitted with the Summons does not contain any allegations of wrongdoing or violations of any kind against the Defendants . . . ."

At the motion hearing on June 10, 2009, Myers' attorney stated:

> Your Honor, Mr. Smith filed in this court a document which was a Summons. And attached to the document was simply a Proof of Service . . . .

> I really don't know what this is, and neither does my client. But we have a Summons, and we have a document attached to it which is called the Proof of Service. It's not a Complaint. I don't know what it is . . . .
>
> If Mr. Smith wants to get ahold of a lawyer and file some appropriate pleadings, he certainly has the right to do that within the statutes, case law, and court rules. But this certainly isn't it.
>
> So we would ask that the Court dismiss this Summons and whatever is attached to it.

Plaintiff responded that he "served my Pleadings at a different time than the Summons. And for some reason it appears that Myers did not submit that to her attorney." Myers' attorney indicated that the "statement of undisputed facts and petition for declaratory judgment" had not been attached to the summons that had been served.[2] The attorney also indicated that a declaratory judgment was not appropriate for the matters raised in the document. The trial court stated: "This really doesn't give notice of what it is that you want. And I'm not sure if this is a -- some type of an employment lawsuit. If it really is one for Declaratory Judgment or one for damages or what it is. I'm not sure either." The court indicated that the document was not in compliance with the laws of Michigan. The court granted Myers' motion for summary disposition, stating, in part: "Nobody can figure out what it is you want out of this whole thing. How can they defend it if you won't tell them what it is? It's so garbled up, I can't figure it out either."

It is difficult to discern plaintiff's precise arguments on appeal. However, it appears that he is arguing that the trial court erred in finding that his initial pleading was not in conformity with the court rules and in therefore granting Myers' motion for summary disposition. We disagree. First, the purported complaint was not properly served on Myers in accordance with MCR 2.105.[3] The document that was attached to the summons was entitled a "proof of service"

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[2] Apparently this document was sent to Myers some months before the summons.

[3] MCR 2.105 states, in part:

> **(A) Individuals.** Process may be served on a resident or nonresident individual by
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> (1) delivering a summons and a copy of the complaint to the defendant personally; or
>
> (2) sending a summons and a copy of the complaint by registered or certified mail, return receipt requested, and delivery restricted to the addressee. Service is made when the defendant acknowledges receipt of the mail. A copy of the return receipt signed by the defendant must be attached to proof showing

and did not conform to the form of a complaint as dictated by MCR 2.111.[4] The trial court was justified in dismissing the case based on these deficiencies alone, but the court went further and found that plaintiff's additional document entitled "statement of undisputed facts and petition for declaratory judgment" failed to comply with the law and that summary disposition under MCR 2.116(C)(8) was appropriate.

We review a grant of summary disposition de novo. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). A motion under MCR 2.116(C)(8) should be granted if "[t]he opposing party has failed to state a claim on which relief can be granted."

> A motion for summary disposition under MCR 2.116(C)(8) relies on the pleadings alone, and all well-pleaded factual allegations in a complaint are taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. [*Id*.]

Plaintiff's "complaint" indicated that he "does not seek judgment for damages at this time." He then evidently sought a declaratory judgment that Myers admitted to certain facts because of her failure to respond to an informal statement. He also stated, without specificity, that Myers may have "committed an attempted fraud" and "leaves to the discretion of the Court as to any penalty for 'attempted fraud.'" He then stated that Myers may have committed a crime. Finally, he stated that Myers may have tortiously interfered with a business expectancy, but again he sought no damages for this tort.

Plaintiff's allegations, as framed, were not applicable for a declaratory judgment. As noted in *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978):

> The existence of an "actual controversy" is a condition precedent to invocation of declaratory relief. In general, "actual controversy" exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights.

Plaintiff's allegations of wrongdoing were not encompassed by this framework. His purported complaint was a confusing amalgam of allegations, and the trial court properly concluded that it failed to state a claim on which relief could be granted.

Plaintiff contends that the trial court erred in awarding Myers $500 in attorney fees for a frivolous motion. We review a trial court's decision to award attorney fees for an abuse of discretion, although "[a]ny findings of fact on which the trial court bases an award of attorney fees are reviewed for clear error." *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571

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service under subrule (A)(2).

[4] Myers attached a copy of the document entitled "proof of service" to her brief on appeal, and plaintiff in his reply brief does not dispute that this is the document that was attached to the summons.

(2007). MCR 2.625(A)(2) states that "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591." MCL 600.2591 states:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.
>
> (b) "Prevailing party" means a party who wins on the entire record.

The trial court awarded the $500 as sanctions for plaintiff's objection to the proposed order that Myers submitted after the summary-disposition hearing. The court stated:

> I did review the proposed order submitted . . . on behalf of the defendant that basically indicates it was hereby Ordered and adjudged that defendant's Motion For Summary Disposition is hereby granted which is exactly what I did at the hearing. And then there were some convoluted pleadings filed by Mr. Smith objecting to my signing of that Order. The Order appears appropriate to me. The objection appears frivolous, so at this time I'm going to grant the Motion for Sanctions and order that Mr. Smith be ordered to pay . . . the sum of $500 for attorney fees that had to be taken to be here today.

The order presented by Myers stated:

> Upon the reading and the filing of the Motion for Summary Disposition and the proofs being taken in open Court and the Court being otherwise fully advised in the premises;

> IT IS HEREBY ORDERED AND ADJUDGED that Defendant's Motion for Summary Disposition is hereby granted.[5]

Plaintiff filed an objection to the order, arguing that the statement "[u]pon . . . the proofs being taken in open Court" was inaccurate because "Respondent failed to rebut any of Smith's facts and therefore did not have any 'proofs' to be 'taken' . . . ." Plaintiff then entered a litany of objections to Myers's summary-disposition motion and other documents. A review of plaintiff's objection shows that it was indeed frivolous and devoid of arguable legal merit, and the trial court therefore did not err in awarding sanctions.

Plaintiff also argues that the trial judge should have granted plaintiff's motion for disqualification.[6] We review the denial of a motion to disqualify for an abuse of discretion. *People v Bennett*, 241 Mich App 511, 513; 616 NW2d 703 (2000). MCR 2.003(C) states:

> (1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:
>
> (a) The judge is biased or prejudiced for or against a party or attorney.
>
> (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v Massey*, US ; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.
>
> (c) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
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> (d) The judge has been consulted or employed as an attorney in the matter in controversy.
>
> (e) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.
>
> (f) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding.

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[5] Myers attached a copy of the proposed order to her brief on appeal, and plaintiff in his reply brief does not argue that it is inaccurate.

[6] The court denied this motion and a motion for reconsideration without elaboration, stating that there was "no legal basis for granting them . . . ."

(g) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

Plaintiff did not identify any proper basis to disqualify the judge. There is no support for plaintiff's allegation that the judge failed to read the pleadings or otherwise failed to act in accordance with the law. Plaintiff took issue below with the judge's request that plaintiff "leave the courtroom now" after the conclusion of the summary-disposition hearing. However, this request was within the trial court rights, because plaintiff was repeatedly objecting to the trial court's ruling.[7] The trial court did not err in denying the motion for disqualification.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher

[7] Plaintiff argues that the trial court failed to disclose its findings. It is unclear whether plaintiff means this to be a separate appellate argument or whether he means it to be encompassed by the disqualification issue. At any rate, the argument is utterly without merit. The court adequately disclosed its findings. Also, it is unclear whether plaintiff is raising, as a separate appellate issue, the argument that the trial court erred in denying his motion for reconsideration. In any event, we note that plaintiff, in his motion, did not identify any "palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." See MCR 2.119(F)(3). The trial court did not err in denying the motion.